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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 69

JESSE MILLER SINCLAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 15) is reported at 174 F. 2d 933.

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1949 (R. 16). The petition for a writ of certiorari was filed on May 12, 1949, and was granted on June 27, 1949 (R. 19). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a letter from a husband to his estranged wife, in which he accused her in foul and indecent language of adultery and perverted sexual practices, is a privileged communication, and, if so, whether the privilege was waived by his failure to raise the question of privilege at his trial for the offense of sending the letter through the mails.

2. Whether Section 211 of the Criminal Code, prohibiting the mailing of obscene and filthy letters and other materials, applies to and may constitutionally be applied to the mailing of such a letter to one's spouse.

3. Whether such a letter was "obscene" as well as "filthy," and, if "filthy" only, whether the failure of the indictment to use that term in describing the letter was a fatal defect requiring reversal, though raised for the first time on appeal.

STATUTE INVOLVED

Section 211 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 334; now 18 U. S. C. [1948 Revision] 1461) provided in pertinent part:

> Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be con-

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veyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable * * * shall be fined not more than $5,000, or imprisoned not more than five years, or both. * * *

STATEMENT

Count 1 of a two-count indictment (R. 2) filed September 8, 1948, in the District Court for the Eastern District of Pennsylvania charged that petitioner on or about July 14, 1948, in Media, Pennsylvania, deposited in the mail "a certain obscene, lewd and lascivious letter and writing" enclosed in an envelope addressed to Grace Somers, Haddonfield, New Jersey, in violation of Section 211 of the Criminal Code of 1909, *supra,* (now 18 U. S. C. [1948 Revision] 1461). Count 2, charging the mailing of a like letter to Grace Somers' mother, was dismissed solely for lack of proof that petitioner himself mailed it (R. 10-11), though the proof showed that he wrote it and that it was received by the addressee in the same mail that brought the other letter (R. 3-4, 5). Following a trial before a judge, a jury having been waived (R. 1), petitioner was found guilty on count 1 and sentenced to imprisonment for one year and a day (R. 14). On appeal to the Court of Appeals for the Third Circuit, the judgment of conviction was affirmed (R. 16).

The Government's evidence may be summarized as follows:

On July 14, 1948, petitioner mailed the letter involved in count 1 in an envelope addressed to his wife in her maiden name, Grace Somers (R. 3, 7-8). In this letter, which is reproduced at R. 13, he accused his wife, in foul and indecent language, of adulterous and perverted sexual relationships with men, and asked her if she had "told [her] family" about such conduct. Petitioner and his wife had not been living together for several months (R. 5-6). His mother-in-law, with whom his wife was staying during this period, testified that her daughter and petitioner "had no home" and that he was visiting her week ends (*ibid.*). The letter in question was delivered to the mother-in-law's mail box by a postman on July 15, 1948 (R. 3). She took the letter from the mail box and gave it to her daughter, who opened it in her presence and "started to read it but couldn't finish" (R. 4). When Mr. Somers, petitioner's father-in-law, came home, it was decided that this letter and the letter addressed to the mother-in-law (see p. 3, *supra*) "should be turned over to the proper authorities" (R. 4-5). Accordingly, petitioner's wife and her parents turned the letters over to the postal authorities in Camden, New Jersey (R. 6). On July 21, 1948, a post office inspector visited petitioner at the boarding or rooming house in Ridley Park, Pennsylvania, where he was living, and petitioner

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admitted writing and mailing the letter addressed to his wife (R. 7-8).

SUMMARY OF ARGUMENT

I

The letter was not a privileged communication. It was the very basis of the crime denounced by the statute—a part of the corpus delicti. Without disclosure of the letter it would be impossible to establish the crime at all. Thus, application of the privilege rule would destroy the force of the statute in cases of this class. Other considerations make it clear that the letter was not privileged. First, petitioner was living in separation from his wife when he wrote the letter. There was active hostility between them. No privilege arises under such circumstances. Secondly, the letter was turned over by the wife to a third party, the postal authorities. Under the weight of authority, the confidential communication privilege ceases when a letter comes into the possession of a third party. Finally, under a well recognized exception to the privileged communication rule, there is no privilege where the spouse-recipient of the communication is the person primarily aggrieved by the offense for which the other spouse is being tried. This exception is here applicable since petitioner's estranged wife was, in a real sense, the victim of petitioner's offense.

In any event, even if the case falls within no exception to the privilege rule, petitioner here waived the privilege by failing to object to the introduction of the letter at the trial.

II

Section 211 of the Criminal Code, on which this prosecution was based, declares *every* obscene or filthy letter, etc., nonmailable, and provides for the punishment of *whoever* knowingly deposits such a letter in the mails. No exception is provided for the case of mail passing between spouses. Nor is there any sound reason for reading such an exception into the unqualified language of the statute. It was so held in the only decision under the statute which considers this point. *United States* v. *Musgrave*, 160 Fed. 700 (E. D. Ark.).

The First Amendment's guaranty of free speech is no bar to so interpreting the statute. It has long been settled that barring obscene and other illegal matter from the mails invades no rights guaranteed by that Amendment.

III

Petitioner in effect concedes that the letter contained "filthy" language, but denies that it was "obscene," as charged, and as that word was construed in *Swearingen* v. *United States*, 161 U. S. 446. But the objectionable language plainly related to sexual impurity. It therefore was probably "obscene" even under the *Swearingen* test,

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since it was principally the absence of sexual filth in the *Swearingen* document that excluded it from the definition of "obscene" adopted in that case.

But even it be assumed, *arguendo,* that petitioner's letter was merely "filthy" and not "obcene," the omission of the former word from the indictment in characterizing the letter was harmless and should be disregarded. The statute bars both types of literature from the mails, and the indictment positively identified the letter and specified the statute alleged to have been violated. The indictment, therefore, apprised petitioner of the crime charged with sufficient certainty to enable him to make his defense and to protect him after judgment against a second prosecution for the same offense. This was sufficient. No showing of prejudice is made, and none is conceivable.

ARGUMENT

I

The Letter in Question Was Not a Privileged Communication: and Even If It Were, Petitioner Waived the Privilege by Failing to Claim It

Petitioner contends (Pet. 5-6) that the letter on which count 1 of the indictment was predicated was a confidential communication from himself to his wife and that therefore, under common-law principles, it was "absolutely privileged," erroneously received in evidence, and erroneously permitted to be "the basis for either a prosecution or conviction."

We do not believe, however, that the doctrine of privileged communications is applicable to the letter mailed by petitioner to his estranged wife in this criminal proceeding brought under Section 211 of the Criminal Code, *supra*, pp. 2-3. That statute in clear and unambiguous language makes it a crime for any person to knowingly mail obscene or filthy letters, which language is plainly broad enough to include letters of that character mailed by a husband to his wife. In the case at bar, petitioner's letter was not, therefore, merely an item of collateral proof that petitioner had committed the crime denounced by the statute; it was the very basis of the crime itself—a part of the corpus delicti. Without disclosure of the contents of the letter there could be no legal judicial determination that it was or was not of the class of letters interdicted by the statute. Consequently, application of the privilege rule to petitioner's letter would leave the statute without force in this case, for it would have the effect of making it impossible to establish the crime at all. In short, it would nullify the statute *pro tanto*. Obviously, a rule of evidence may not be properly invoked where its application will produce that result. Moreover, various other considerations make it clear that the letter here involved was not a privileged communication.

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At common law,[1] certain types of "communications," notably those between husband and wife, and between attorney and client, were recognized as "privileged," provided certain conditions (such as the requirement that the communication be made in confidence) were fulfilled. By "privileged" was meant that the person making the communication was privileged to forbid the disclosure of its contents in a court of law by the person to whom it was made. It was a rule of evidence designed to suppress the elicitation of the full truth about some matter in issue because of the realization or belief that, despite the desirability of full development of the truth, compulsory disclosure of confidential communications by one spouse to the other or by a client to his attorney would tend to prevent or diminish the giving of such confidences, which it is a policy of the law to foster.[2] See 8 Wigmore, *Evidence* (3d ed.), §§ 2285, 2290-2292, 2332-2337; Underhill, *Criminal Evidence* (4th ed.), § 330; 3 Wharton, *Criminal Evidence* (11th ed.), § 1211. For several reasons, we submit, petitioner cannot rely upon this doctrine of privilege.

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[1] The applicable law on this phase of the case is the common law as interpreted and applied in the light of reason and experience. Rule 26, F.R. Crim. P.; *Wolfle* v. *United States*, 291 U.S. 7, 12; *Funk* v. *United States*, 290 U.S. 371.

[2] Sharply to be distinguished from the confidential communication privilege, in so far as it relates to the marital relationship, is the privilege of each spouse to refuse to testify against, or suffer adverse testimony by, the other. See 8 Wigmore, *Evidence* (3d ed.), §§ 2227-2245, 2334(2).

A. *The privileged communication rule has no application where the spouses are living in separation.*—Since "the privilege, obviously, is applicable only to communications made while the marital status obtains," the "application of the privilege to a communication made between husband and wife *living in separation* * * * cannot be conceded; for here the policy of the privilege does not apply * * *, since the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence" [italics in the original]. 8 Wigmore, *Evidence* (3d ed.), § 2335(1). *Holyoke* v. *Estate of Holyoke,* 110 Me. 469, 474 (1913), states this rule and its underlying principle as follows:

> But since the [privilege] rule is based upon the necessity of preserving the confidence which must exist in order to create and maintain mutual happy relations and fulfill the purposes of marriage, we think it should not apply when the parties are living in separation, * * * and the one making the communication is actively hostile to the other, and is known to be so. There is no suggestion of confidence in such relation. The parties are put on their guard. * * *

It is clear that the letter in question was not a privileged communication because petitioner was living in separation from his wife at the time he wrote it. He had, in fact, been living apart from her for several months (*supra,* p. 4). That he

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visited her on week ends does not necessarily connote continuance of the marital status. It is consistent, as well, with efforts to repair a breach in that status, or, on the other hand, to widen the breach into absolute divorce. It is clear from the fact that he wrote such a letter and addressed it to her in her maiden name (*supra*, p. 4) that there was a breach. In addition to accusing his wife of vile sexual conduct, he wrote her that "since you want trouble we shall have it" (R. 13). So incensed was the wife by the abusive accusations in the letter, furthermore, that she immediately turned it over to the postal authorities. Obviously, there existed between these spouses no element of the marital harmony and mutual confidence which are at the root of the privileged communication principle. On the contrary, they were "actively hostile" to each other, and there was "no suggestion of confidence" in their relations (*Holyoke* v. *Estate of Holyoke*, quoted *supra*). The very reason for the privilege rule is thus here absent.

B. *A confidential letter from one spouse to the other is admissible if it comes into the possession of a third person.*—While the decisions are not uniform, the weight of authority is that a letter from one spouse to the other, though it contain confidential matter, is admissible in evidence against the sender where it comes into the possession of a third party (including prosecution authorities). The opposing considerations on this point seem to be as

follows: in 8 *Wigmore*, sec. 2339, it is urged that documents of communication voluntarily delivered to a third person by the addressee-spouse should retain the privilege "for otherwise the privilege could by collusion be practically nullified for written communications"; against the privilege, it has been contended that in the interest of obtaining the truth the privilege should be strictly construed, and that delivery of a written communication to a third person is analogous to the rule that a third person who overhears a conversation between husband and wife may testify concerning it. 8 Wigmore, sec. 2339. A large majority of American courts have followed the latter reasoning. *Lloyd* v. *Pennie*, 50 Fed. 4, 8-11 (N. D. Cal.); *Caldwell* v. *State*, 146 Ala. 141, 143-144 (1906); *McNeill* v. *State*, 117 Ark. 8, 12-14 (1915); *People* v. *Swaile*, 12 Cal. App. 192, 195-196 (1909); *State* v. *Hoyt*, 47 Conn. 518, 540 (1880); *State* v. *Buffington*, 20 Kans. 599, 613-615 (1878); *State* v. *Morgan*, 147 La. 205, 222-224 (1920), certiorari denied, 253 U. S. 498; *State* v. *Wallace*, 162 N. C. 622, 629-630 (1913); *Whalen* v. *State*, 12 Ohio C. C. 584, 587-590 (1896); *State* v. *Mathers*, 64 Vt. 101 (1891); *State* v. *Nelson*, 39 Wash. 221, 228 (1905); 23 Am. & Eng. Encyc. of Law (2d Ed.) 97. *Contra: Bowman* v. *Patrick*, 32 Fed. 368 (C.C.E.D. Mo.); *McKie* v. *State*, 165 Ga. 210, 214-221 (1927); *Commonwealth* v. *Fisher*, 221 Pa. 538, 543-544 (1908). "The question was not whether the

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husband or wife could have been compelled to produce this evidence," said the court in *State* v. *Hoyt, supra*, 47 Conn. at 540, "but whether, when the letters fell into the hands of a third person, the sacred shield of privilege went with them. We think not."

Here, petitioner's wife was not compelled or permitted over objection to testify to the contents of the letter in question, nor did she produce it at the trial. She voluntarily turned the letter over to the post office authorities immediately following her receipt of it and long before the commencement of the trial. It was introduced in evidence by the Government and identified by a post office inspector, who testified that petitioner admitted to him having written and mailed it and that he (petitioner) initialed it as a token of this admission (R. 8). On this independent ground, therefore, it was not privileged.

C. *The privileged communication rule is not applicable where the spouse-recipient of the communication is the person aggrieved by the commission of the offense for which the other spouse is being prosecuted.*— Under a recognized exception to the privileged communication rule as applied to spouses, the spouse-recipent of a confidential communication is at liberty to disclose the communication where he or she is the person primarily aggrieved by the commission of the offense for which the other spouse is being prosecuted. 3

Wharton, *Criminal Evidence* (11th Ed.), § 1251; 8 Wigmore, *Evidence* (3d Ed.), § 2338; *Doolittle* v. *State*, 93 Ind. 272, 274-275 (1883); *Beyerline* v. *State*, 147 Ind. 125, 129-133 (1897); *E. W. M.* v. *J. C. M.*, 2 Tenn. Ch. App. 463, 472-487 (1897); *Spearman* v. *State*, 68 Tex. Cr. 449, 460-462 (1913); see American Law Institute, *Model Code of Evidence*, Rules 215, 216. This exception is founded on the same principle of "necessity" which permits one spouse to testify against the other, notwithstanding the general prohibition against such testimony, where the offense for which the defendant spouse is on trial is essentially an offense against the witness-spouse. See *United States* v. *Mitchell*, 137 F. 2d 1006, 1008-1009, reaffirmed, 138 F. 2d 831 (C. A. 2), certiorari denied, 321 U. S. 794 (wife-victim of defendant in a Mann Act prosecution *held* properly allowed to testify against him). The overriding considerations of public policy underlying the exception in the latter type of case operate no less imperatively to require the exception in cases of the former type. 8 Wigmore, *Evidence* (3d Ed.), § 2338. Thus, in *E. W. M.* v. *J. C. M.*, *supra*, 2 Tenn. Ch. App. at 486-487 (suit for divorce on grounds of cruelty; admission in evidence of a vituperative letter from defendant to plaintiff, written after their separation, challenged as violating the privileged communication rule), it was said:

> * * * we are of the opinion that the letter admitted as evidence over the objection of the

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> defendant is admissible if it be found to contain matters of such character as would constitute by its writing and delivery to [plaintiff] an act or acts of cruelty and indignity. * * * The objection made to the letter was on the ground that it was a confidential communication. To urge the exclusion of this letter on the ground of promoting for the sake of public policy the mutual trust, love, confidence, freedom and frankness, would to any mind, other than the strictly legal, seem the height of irony and mockery. * * *

Here, the mailing of the letter was itself the crime and petitioner's estranged wife was, in every real sense, the victim of the offense. True, technically speaking, the offense was the unlawful depositing of offensive matter in the mails, just as in the *Mitchell* case, *supra* (see 137 F. 2d at 1008-1009), the offense was, strictly, "not a crime against the person of the wife, but a crime against interstate commerce." But, realistically, petitioner's offense was directed against his estranged wife. Consequently, for this additional independent reason, the letter was not inadmissible as a privileged communication.

D. *In any event, assuming the letter was privileged, the privilege was waived.*— It is well settled, of course, that the privilege of a spouse to forbid the disclosure of a confidential communication, like any privilege, may be waived by the spouse making the communication. 8 Wigmore, *Evidence* (3d

Ed.), § 2340; 3 Wharton, *Criminal Evidence* (11th Ed.), § 1255. It is equally well settled that failure on the part of the spouse possessing the privilege to make timely objection to disclosure of the communication constitutes waiver. *Steen* v. *First National Bank*, 298 Fed. 36, 41 (C. A. 8); *Proffitt* v. *United States*, 264 Fed. 299, 302-303 (C. A. 9); *Hembree* v. *Commonwealth*, 210 Ky. 333, 334-335 (1925); *State* v. *Foster*, 164 La. 813, 830-833 (1927); *Ruch* v. *State*, 111 Ohio St. 580, 587-589 (1924); *Commonwealth ex rel. Berardino* v. *Berardino*, 96 Pa. Super. 288, 291-292 (1929); *McCormick* v. *State*, 135 Tenn. 218, 228-231 (1916); *Johnson* v. *State*, 95 Tex. Cr. 483, 487 (1923); 3 Wharton, *Criminal Evidence* (11th Ed.), § 1257. Far from claiming the now-asserted privilege by objecting to the admission of the letter in controversy, petitioner's counsel stated, when counsel for the Government offered it in evidence, "I do not believe I can make any objection to that" (R. 9). And so far as appears from the record, petitioner did not object at any other point in the trial proceedings that the letter was privileged. However, petitioner now asserts that there was no waiver of the privilege by his failure to assert it, in that when his "trial counsel argued in support of his motion for judgment of acquittal * * *, he contended that the letter was a confidential communication and could not be used as evidence to convict petitioner" (Petitioner's brief, pp. 6-7). This was too late. *Gibson* v. *United States*, 31 F.

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2d 19 (C.A. 9), certiorari denied, 279 U. S. 866. Having thus failed to make a timely objection to the admission of the letter, he is now barred from seeking reversal therefor. *Proffitt* v. *United States, supra,* 264 Fed. at 302-303.

II

Obscene or Filthy Mail Matter Sent to One's Spouse Is Within the Proscription of Section 211 of the Criminal Code, and the First Amendment's Guaranty of Freedom of Speech Is No Bar to So Construing the Statute

A. Section 211 of the Criminal Code (*supra,* pp. 2-3), on which this prosecution was based, declares that "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be nonmailable matter" and provides for the punishment of "[w] hoever shall knowingly deposit, or cause to be deposited, for mailing or delivery" any material so declared to be barred from the mails. The unqualified and sweeping terms of this enactment forbid any reading into it of an exception in favor of one mailing such forbidden materials to one's wife—particularly where, as here, the wife is living in separation from her husband, and where the mailed matter so shocks and offends her that she forthwith turns it over to the postal authorities for punitive action against the sender.

The only decision that we have found that is squarely in point in this respect is *United States* v. *Musgrave,* 160 Fed. 700 (E. D. Ark.). That case

arose on a demurrer to an indictment charging the defendant with sending through the mails an obscene, lewd, and lascivious letter addressed to his wife, in alleged violation of Section 3893 of the Revised Statutes (predecessor of Section 211 of the Criminal Code). The court said (160 Fed. at 704-705):

> To sustain the contention of defendant would necessarily require the court to insert in the act an exception which Congress has failed to make. It would necessitate in almost every case a determination of the moral or mental condition of the addressee of every obscene matter sent through the mails, and, as stated by the assistant district attorney, "the jury would have to determine in every case whether the mind of the receiver of the letter could be corrupted, and an acquittal would result if the addressee were a woman of the town, were insane, were so high minded as not to be influenced by letters of this character, were of such immature years as not to understand the import of the words, were so depraved that he could sink no lower." A prostitute's mind, or that of a degenerate, may not be open to any immoral influences, and the receipt of a lascivious or lewd letter, book or picture may not corrupt their minds because they are beyond such influences. Would that fact be a defense to a prosecution under this statute? * * * Or if publishers of such literature should use the mails for the purpose of sending it to re-

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> tail dealers, who may have no intention of reading it, and whose minds for this reason could not be corrupted, but merely sell it, could it be successfully claimed that such acts would not be violative of the statute? * * * In the opinion of this court the language used clearly and convincingly shows that the intent of Congress was to prevent the abuse of a great privilege granted by a magnanimous government for the purpose of promoting the welfare and intelligence of its people, and not permit it to become a "vehicle for the transmission or circulation of mental filth."

"It matters not what the relationship between sender and sendee is," concluded the court (160 Fed. at 706), "or what the effect of the receipt of the article sent may have on the mind of the particular person to whom it is sent. If it is of such a nature that the reading would, in the opinion of reasonable persons, * * * have a tendency to deprave or corrupt the minds of reasonable persons and would suggest to the minds of either sex thoughts of an impure or libidinous character, it is within the prohibition of the statute."

Of course, the statute does not prohibit the mailing of all correspondence on intimate subjects between husband and wife. Natural intercourse and candid discussion of the facts of life between husband and wife are not substantive evils, since the marital status permits them and thus purges them of immorality and indecency. Hence, corre-

spondence between a husband and wife on the permitted intimacies of the marital relationship, written in the confidence of that relationship is not considered to be obscene or filthy, and does not fall within the proscription of the statute. But this does not mean that the statute excepts from its purview all correspondence passing between spouses. The statute contains the broad language "Every" and "Whoever", without any exception as to persons, and we have found nothing in its legislative history to indicate that an implied exception of that character was intended. As indicated, however, many communications on sexual matters between spouses would not be obscene. But the statute could still reasonably cover correspondence between husband and wife if the correspondence is obscene or filthy. Particularly is this so when the parties are estranged and the obscene or filthy remarks are directed at the other spouse.

That matters which are obscene or filthy within the meaning of the statute may pass between husband and wife is clear. For example, a package of sex-relationship pictures or magazines mailed by a husband to his wife for her to distribute would be no less obscene than if sent to someone else for the same purpose. In the circumstances, such pictures would surely be obscene or filthy within the meaning of the statute. And even if the pictures were not destined for distribution, they would

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still be within the proscription of the statute if their subject matter should be forms of intercourse which are foreign to and in violation of the pureness that surrounds matrimony. The subject matter of the pictures being abhorrent to the marital relationship, they would not be purged of their obscene and filthy characteristics by that relationship, since their evil effect would be as capable of corrupting the wife as it would any stranger. We believe that the same considerations are applicable to letters, for it is inescapable that a letter, couched in the vilest of language and pointedly referring to wantonly impure and beastly sexual relationships between human beings, is as much a substantive evil when sent to a wife as when sent to a stranger.

Oral upbraiding of one spouse by the other in vile and indecent language may become disorderly conduct, and as such it is a substantive evil. It is clearly repugnant to the marital relationship. A verbal attack by a husband upon his estranged wife in a letter is no less repugnant to that relationship, particularly where the letter is written in a malicious and revengeful spirit and where it contains words so foul and accusations so savage and degrading as to shock the wife into disclosing the communication to the members of her family or to the public authorities.

History reveals many instances of men abusing their wives and corrupting their morals in various ways, and no sound reason is apparent why this

result may not be accomplished through the use of obscene and filthy correspondence. There is nothing startling, therefore, in the contention that the Congress intended, when enacting the obscene mail statute, to prevent the use of the mails in carrying out these nefarious practices by husbands against their wives, as well as by stranger against stranger.[3] In the case at bar, the letter mailed by petitioner to his estranged wife contains accusations, emphasized by their vulgarity, which attack the other spouse in obscene and filthy language, and which focus on the mind two impure and immoral acts, i.e., adultery and sexual perversion, both of which are repugnant to the marital relationship and destructive of it. Those words, we submit, bring petitioner's letter within the proscription of the statute.

B. Petitioner's attack (Pet. 12-14) upon the instant application of the statute as an invasion of his constitutional right of free speech guaranteed by the First Amendment is clearly baseless. That there is no inconsistency between a statute barring obscene and other illegal matter from the mails and the First Amendment has long been settled. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194

[3] Cf. *Wilson* v. *United States*, 167 F. 2d 223 (C.A. 6), certiorari denied, 334 U.S. 838; *Cohen* v. *United States*, 214 Fed. 23, 29 (C.A. 9); and *Pappas* v. *United States*, 241 Fed. 665 (C.A. 9), affirming convictions of husbands charged with transporting their wives in interstate commerce for immoral purposes, in violation of the Mann Act (now 18 U.S.C. 2421).

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U. S. 497; *Donaldson* v. *Read Magazine,* 333 U. S. 178; *Coomer* v. *United States,* 213 Fed. 1 (C. A. 8); *Tyomies Publishing Co.* v. *United States,* 211 Fed. 385, 388 (C. A. 6); *Knowles* v. *United States,* 170 Fed. 409, 411-412 (C. A. 8); *Harman* v. *United States,* 50 Fed. 921 (C. C. D. Kans.); cf. *Winters* v. *New York,* 333 U. S. 507, 510. Obscenity and filth are themselves substantive evils, and penalties imposed for such language have never been tested in the "clear and present danger" terms applicable to utterances which embody the appeals to reason given the highest constitutional sanctity.

III

The Failure of the Indictment to Describe the Letter in Question as "Filthy" Was Not Prejudicial

The indictment did not set out the letter *in haec verba,* but described it as "a certain obscene, lewd and lascivious letter and writing, which said letter and writing was enclosed in an envelope addressed and directed to Grace Somers, 234 West Summit, Haddonfield, New Jersey, which letter and writing is too obscene, lewd and lascivious to be set forth upon the records of this Honorable Court, but profert whereof is here made." The indictment also set forth the date and place of mailing and specified the statute, violation of which was charged. (R. 2.)

Petitioner at no time prior to or during the trial, so far as the record shows, raised the question of

whether the letter thus described and received in evidence was obscene, lewd, or lascivious. This point appears to have been raised for the first time on appeal, and it is again pressed before this Court (Pet. 7-12).

The argument is that the letter is not obscene, lewd, or lascivious as those words were construed in *Swearingen* v. *United States,* 161 U. S. 446. In that case, this Court held that a certain political diatribe, in which the author referred to his opponent in exceedingly coarse and vulgar language (see 161 U.S. at 447, note 1), was neither obscene, lewd, nor lascivious within the meaning of those words as used in Section 3893 of the Revised Statutes (the predecessor of Section 211 of the Criminal Code). It held that all three words "signify that form of immorality which has relation to sexual impurity," and that while the language in the document in question was exceedingly coarse, vulgar, and libellous, it contained nothing "of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the minds and morals of those into whose hands it might fall" (161 U. S. at 451).

When Section 3893 of the Revised Statutes was incorporated into the Criminal Code of 1909 as Section 211, the words "and every filthy" were added. The legislative history of this amendment indicates that Congress thought this Court, in the

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Swearingen case, had too narrowly construed the statute as it formerly stood, and added these words to bring within its scope "filthy" documents which did not necessarily relate to sexual impurity. See 43 Cong. Rec. 284, statement of Mr. Moon, quoted at Pet. 8-9; see also *United States* v. *Limehouse*, 285 U. S. 424, 426-427.

Petitioner now in effect concedes (see Pet. 10) that the letter in issue is "filthy"—it is, indeed, hardly deniable—but urges reversal of his conviction because, he says, it is not "obscene," "lewd," or "lascivious," as charged in the indictment.

While there is language in the *Swearingen* case which indicates that a publication, to come within the proscription of the statute as it stood before the 1909 amendment, must tend to suggest libidinous desires on the part of the reader, the principal emphasis of that decision was on the point that the document there in issue did not relate to sexual matters at all (except quite incidentally, by using such words as "pimp," etc.). In the case at bar, on the other hand, the objectionable portions of the letter quite obviously relate to "that form of immorality which has relation to sexual impurity" (161 U. S. at 451)—the precise aspect found lacking in the *Swearingen* case. We think therefore, that the letter here involved is at least "obscene," even under the *Swearingen*

test.[4] We suggest that this would be self-evident if the language involved here appeared in a newspaper or magazine which was generally circulated.

But assuming, *arguendo,* that the letter here involved was not obscene, lewd, or lascivious, but merely "filthy," the omission of the latter word from the indictment in characterizing the letter was harmless and should be disregarded. See *Hagner* v. *United States,* 285 U. S. 427, 431; *Koa Gora* v. *Territory of Hawaii,* 152 F. 2d 933, 935 (C.A. 9), certiorari denied, 328 U. S. 862; Rule 52(a), F.R. Crim. P. Had petitioner attacked the indictment, before trial, for failure to mention the word "filthy," a new indictment including the word could have been obtained and the end result would have been the same. It cannot be said that the indictment failed to apprise him of the crime charged with such reasonable certainty that he could make his defense and protect himself after judgment against prosecution for the same offense.

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[4] Webster's New International Dictionary (2d ed.) gives two definitions of "obscene" (exclusive of an obsolete meaning): (1) "Offensive to taste; foul; loathsome; disgusting," and (2) "Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity, and decency forbid to be exposed; lewd; indecent; as, *obscene* language, dances, images."

It was the first of these two meanings of "obscene" that the Government argued for in the *Swearingen* case. This Court, however, in deference to the collocation of the word "obscene" with "lewd" and "lascivious" in the statute, adopted the second meaning. The essential difference between the two meanings is that, in its first sense, "obscene" means, generally, offensive to good taste, while in its second sense it means, specifically, offensive to chastity.

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Hagner v. *United States, supra,* 285 U. S. at 431; *Price* v. *United States,* 165 U. S. 311; *Rosen* v. *United States,* 161 U. S. 29, 40; *Rinker* v. *United States,* 151 Fed. 755 (C.A. 8); *Timmons* v. *United States,* 85 Fed. 204 (C.A. 6). It positively identified the letter and specified the statute alleged to have been violated. This was sufficient. Rule 7(c), F.R. Crim. P.; *Koa Gora* v. *Territory of Hawaii, supra;* cf. *Hagner* v. *United States, supra,* 285 U. S. at 431; *Kramer* v. *United States,* 166 F. 2d 515, 519 (C.A. 9).

Petitioner proffers no showing of prejudice and it is difficult to conceive of any. At the trial, petitioner's counsel said, "I do not think there is anything to be said on the factual side" (R. 12). This would have been an equally accurate statement had the indictment contained the word "filthy."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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